

## War Crimes

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# WAR CRIMES

Robert Cryer\*

## INTRODUCTION

Rather like in the way that the law of theft and fraud is the set of crimes that relate, overlap, but are narrower than the civil law of property, the law of war crimes is a criminalised subset of violations of International Humanitarian Law (IHL).<sup>1</sup> Hence the law here is parasitic on a violation of IHL.<sup>2</sup> Although this chapter will return to the precise relationship between the two areas of law, it suffices for this moment to say that whilst every war crime is a violation of IHL the converse is not the case.

There have been prosecutions for war crimes throughout history,<sup>3</sup> however, the bases have been different across the years. In the Chivalric era, it was often on the basis of Chivalric codes, which were enforceable across what were, at the time, functionally States.<sup>4</sup> By the 18<sup>th</sup> Century though, war crimes charges were brought on the basis of domestic military codes. Although States could bring charges against enemy nationals it was perhaps not clear at the time whether this was on the basis of individual liability under international law or an exceptional additional domestic jurisdictional ground largely based on passive personality (i.e. nationality of the victim) if they were not committed on the territory of the prosecuting State.<sup>5</sup>

By the end of the First World War, the majority view was probably that liability was based directly on international law,<sup>6</sup> although the matter was not beyond contention.<sup>7</sup> There were still doubts in some quarters even in the Second World War,<sup>8</sup> but the Nuremberg International Military Tribunal had no truck with such arguments. After its famous pronouncement that

crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international

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<sup>1</sup> Michael Bothe, 'War Crimes' in Antonio Cassese, John RWD Jones, and Paula Gaeta (eds.), *The Rome Statute of the International Criminal Court* (OUP, 2002) 380, p.381.

<sup>2</sup> As such, the law of war crimes, in spite of considerable convergence between the two types of law, retains the distinction between international and non-international armed conflicts. See e.g. Sonja Boelaert-Suominen "The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to all Armed Conflicts" (2000) 13 *Leiden JIL* 19.

<sup>3</sup> See generally, Timothy LH McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in Timothy LH McCormack and Gerry J Simpson (eds.), *The Law of War Crimes: National and International Approaches* (The Hague: Nijhoff, 1997) 31.

<sup>4</sup> Maurice H Keen, *The Laws of War in the Late Middle Ages* (London: Keegan Paul, 1965).

<sup>5</sup> On the bases of jurisdiction here see Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: CUP, 3<sup>rd</sup> ed., 2014) Chapter 3.

<sup>6</sup> Report of the Commission on the Responsibility of the Authors of the War and Enforcement, (1920) 14 *AJIL* 95, 122.

<sup>7</sup> The American and Japanese members dissented from this position, *ibid.*, 146 (US), 152 (Japan).

<sup>8</sup> Manfred Lachs, *War Crimes: An Attempt to Define the Issues* (London: Stevens and Sons, 1944); George Manner, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War' (1943) 37 *AJIL* 407.

law be enforced ... individuals have international duties which transcend the national obligations of obedience imposed by the individual state.<sup>9</sup>

It said, with reference to war crimes,

the crimes defined by Article 6, section (b) [i.e the provision that covered such offences] were already recognized as war crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907 and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit argument.<sup>10</sup>

The position was usefully summed up by the Special Tribunal for Lebanon, that said that

[War crimes were] originally born at the domestic level: States began to prosecute and punish members of the enemy military (then gradually also of their own military) who had performed acts that were termed either as criminal offences perpetrated in time of war (killing of innocent civilians, wanton destruction of private property, serious ill-treatment of prisoners of war, and so on), or as breaches of the laws and customs of war. Gradually this domestic practice received international sanction, first through the Versailles Treaty (1919) and the following trials before the German Supreme Court at Leipzig (1921), then through the London Agreement of 1945 and the trials at Nuremberg. Thus, the domestic criminalisation of breaches of international humanitarian law led to the international criminalisation of those breaches and the formation of rules of customary international law authorising or even imposing their punishment.<sup>11</sup>

The nature of the law of war crimes thus necessitates an investigation into its sources.

## THE SOURCES OF WAR CRIMES LAW

The sources of war crimes law are the same as those of IHL, which further are those of public international law more generally, in other words treaty law, customary law, general principles of law, and, as subsidiary means of identifying the law, judicial decisions and the writings of the most highly qualified publicists.<sup>12</sup> It is also important to note the role of national law in this regard, which may be both over, or under-inclusive in this regard. Nonetheless, for many domestic courts that will be the controlling law (although it may be subject to oversight by, *inter alia*, human rights bodies or, in relevant circumstances, the International Criminal Court).<sup>13</sup>

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<sup>9</sup> Nuremberg IMT, 'Judgment and Sentence', (1947) 41 *AJIL* 171, at 221.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Prosecutor v Ayyash*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01-17bis, 16 February 2011, para. 104.

<sup>12</sup> See generally, Dapo Akande, 'The Sources of International Criminal Law'. In Antonio Cassese *et al* (eds.), *The Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) 41.

<sup>13</sup> For useful discussion see Alexandra Huneus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *AJIL* 1.

As is the case in other areas of international law, in spite of their notionally subsidiary role it plays, large developments in the law of war crimes has come thorough the decisions of courts and tribunals,<sup>14</sup> but there have been times when States have rejected some cases outright.<sup>15</sup> This is not always for nefarious reasons. There are times when the reasoning of international tribunals is unconvincing, the dissents more persuasive,<sup>16</sup> which can undermine their authority. That said, national courts often seem unwilling or unable to understand or apply IHL either, perhaps to a greater degree.<sup>17</sup>

Still, the law of war crimes has contributed greatly to IHL<sup>18</sup> Even so, there are some notes of caution that ought to be made. The first is that war crimes are not just part of IHL, they are part of international criminal law, and the two have different principles of interpretation. Perhaps most important is the the *nullum crimen sine lege* (no crime without pre-existing law) principle.<sup>19</sup> This mandates that a very careful approach to interpreting war crimes. So, for example, Article 22 of the Rome Statute of the International Criminal Court reads ‘The definition of a crime shall be strictly construed and shall not be extended by analogy. In cases of ambiguity the definition shall be interpreted in favour of the person being in favour of the person being investigated, prosecuted or convicted’.<sup>20</sup> This does not apply to State responsibility for violations of IHL, where the more general principles of treaty interpretation do instead (although they are also relevant for war crimes too).

In spite of this, there have been some criticisms of the international criminal tribunals (the ICTY in particular), for taking the humanitarian side of humanitarian law and elevating it over the other side of IHL, which is military necessity.<sup>21</sup> Others celebrate what they call the ‘humanization’ of humanitarian law, in particular by the *ad hoc* Tribunals.<sup>22</sup> This may, be more a matter of different cultures towards interpretation between military practitioners and others,<sup>23</sup> one which is sometimes rather antagonistic, and is, more generally, an issue in IHL.<sup>24</sup>

### *The Types of War Crimes*

<sup>14</sup> Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge: CUP, 2014); pp.25-38 is quite rightly, sanguine, to a point.

<sup>15</sup> Ministry of Defence, *Manual of the Law of Armed Conflict* (Oxford: OUP, 2004) 421.

<sup>16</sup> *Prosecutor v Gotovina and Markač*, Judgment, IT-06-90-A, 16 November 2012. See Janine Natalya Clarke ‘Courting Controversy: The ICTY’s Acquittal of Croatian Generals Gotovina and Markač’ (2013) 11 *JICJ* 399.

<sup>17</sup> Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: OUP, 2014).

<sup>18</sup> Christopher J Greenwood, ‘The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia’ (1998) 2 *Max Planck Yearbook of United Nations Law* 97; Darcy, above note ?? Robert Cryer, ‘Of Custom, Treaties, Scholars and the Gavel: The Impact of the International Criminal Tribunals on the ICRC Customary Law Study’ (2006) 11 *Journal of Conflict and Security Law* 239.

<sup>19</sup> See e.g. Kenneth Gallant, *The Principle of Legality in International and Comparative Law* (Cambridge: CUP, 2009).

<sup>20</sup> On which see Bruce Broomhall, ‘Article 22’ in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Court* (Oxford: Hart, 3<sup>rd</sup> ed, 2015) 949.

<sup>21</sup> Michael Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,’ (2010) 50 *Virginia Journal of International Law* 795.

<sup>22</sup> See e.g. Theodor Meron, ‘The Humanization of International Humanitarian Law’ (2000) 94 *AJIL* 239.

<sup>23</sup> David Luban, ‘Military Necessity and the Cultures of Military Law’ (2013) 26 *Leiden JIL* 315.

<sup>24</sup> Robert Cryer, ‘The ICRC and Direct Participation in Hostilities: See a Little Light’ in Robin Geiß (ed.), *The International Red Cross and Red Crescent Movement at 150: Developing and Clarifying International Humanitarian Law* (Cambridge: CUP, 2017) 113.

The law on war crimes is complicated by the knot that forms the term war crimes itself is far from easy to unpick.<sup>25</sup> As noted above it seems that not every violation of IHL can be, *a priori*, be considered a war crime.<sup>26</sup> The issue is also tangled up with the question of the jurisdiction of States, international criminal courts and tribunals, as well as the sources of IHL itself.

As a starting point, though, the classic (although not uncontroversial) statement of the conditions for a violation of IHL to be considered a war crime was given by the International Criminal Tribunal for Former Yugoslavia (ICTY) in its foundational *Tadić* decision. The Appeals Chamber argued that there were four such (cumulative) conditions:

- i. the violation must constitute an infringement of a rule of international humanitarian law;
- ii. the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- iii. the violation must be 'serious,' that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- iv. the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>27</sup>

The authority for these propositions becomes more controversial as they move from i-iv, and all have certain issues of interpretation that are complex.<sup>28</sup> Probably the clearest example of violations of IHL that fulfil all of these criteria are grave breaches of the Geneva Conventions, defined (in a parsing of the Conventions themselves, in the Rome Statute of the International Criminal Court, as being

...any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Willful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Willfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power.
- (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;

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<sup>25</sup> Charles Garraway, 'War Crimes' in Elizabeth Wimshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary Humanitarian Law* (Cambridge: CUP, 2007) 377, p.377.

<sup>26</sup> Fausto Pocar, 'The Criminalization of the Violations of International Humanitarian Law from Nuremberg to the Rome Statute' in Fausto Pocar, Marco Pedrazzi and Micaela Frulli (eds.), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation* (Cheltenham: Edward Elgar, 2013) 3, p. 3.

<sup>27</sup> *Prosecutor v Tadić*, Decision on Interlocutory Appeal on Jurisdiction, IT-94-I-AR72, ICTY 2 October 1995, para 94. For more detailed discussion see Robert Cryer, 'Individual Liability for Violations of the Law of Armed Conflict' in Rain Liivjoa and Timothy L.H. McCormack (eds.), *The Routledge Handbook on the Law of Armed Conflict* (London: Routledge, 2016) 538, pp.540-546.

<sup>28</sup> See Cryer, *ibid*.

(viii) Taking of hostages.<sup>29</sup>

For these offences, States are required to criminalise them on the basis of universal jurisdiction (i.e irrespective of where they have occurred), and seek out, and extradite or prosecute anyone (at least in their territories, or territories over which they have authority) who is suspected of such offences.<sup>30</sup>

It ought to be said, though, that if a violation of IHL does not fulfil the criteria that international law requires, it is still within the rights of a State to criminalise it domestically, subject to the usual principles of criminal jurisdiction that international law provides for.<sup>31</sup> It will not, however, be a war crime for the purposes of individual liability under international law. Things are rendered further more complicated by the fact that there may, owing to the operation of treaty law, things that may be war crimes for the purposes of States parties to certain treaties, but where they are not reflective of custom, not for non parties. Certain aspects of Additional Protocol I may be at issue here,<sup>32</sup> and also some weapons conventions, such as the Ottawa Convention on Anti-Personnel Landmines and the Cluster Munitions Convention, neither of which can be taken as customary *per se*.<sup>33</sup> It might be thought that these are more akin to arms control treaties rather than IHL regimes, but the line between the two is porous to say the least.

#### DEFINING WAR CRIMES: SUBSTANCE AND JURISDICTION

A further issue is that the existence of a war crime in treaty-based or customary international law is not the same as an international criminal tribunal having jurisdiction to prosecute it. Whilst the Nuremberg and Tokyo International Military Tribunals had the authority to prosecute an open ended list of war crimes pursuant to Articles 6(b) and 5(b) of their respective Statutes, owing to the nature of the conduct of the defendants there was little that was prosecuted pursuant to those provisions that would not have traditionally been thought of as war crimes, a point that was not seriously contested by the defence in those proceedings.<sup>34</sup> The International Criminal Tribunal for former Yugoslavia (ICTY), in addition to the right to prosecute Grave Breaches of the Geneva Conventions pursuant to Article 2 of its Statute, also had an open ended provision on war crimes (Article 3) which that Tribunal interpreted as granting it the right to prosecute violations of any applicable IHL in the relevant conflict, so

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<sup>29</sup> On which see Paula Gaeta, 'Grave Breaches of the Geneva Conventions' in Andrew Clapham *et al*, (eds.), *The Geneva Conventions: A Commentary* (Oxford: OUP, 2015) 615; Markus D. Öberg, 'The Absorption of Grave Breaches into War Crimes Law', (2009) 91 *IRRC* 163, at 163; Horst Fischer, 'Grave Breaches of the 1949 Geneva Conventions', in Gabrielle Kirk-McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (The Hague: Kluwer, 2000), 65, pp.70–71.

<sup>30</sup> *Ibid*.

<sup>31</sup> Pocar above note, ?? .p.3.

<sup>32</sup> Where there are obligations to domestically criminalise such violations (Article 85 API). On the customary status of Additional Protocol I see e.g. Christopher Greenwood, 'Customary Status of the 1977 Geneva Protocols' in Astrid J M Delissen and Gerard J Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead* (Dordrecht :Nijhoff 1991) 93, albeit things may have moved on since then, see, e.g. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: CUP 2005).

<sup>33</sup> William A. Boothby, *Weapons and the Law of Armed Conflict* (Oxford: OUP, 2009) Chapters 11,15.

<sup>34</sup> Nuremberg IMT Judgment, above note ??.

long as it was customary, or brought into force by agreement between the parties.<sup>35</sup> This led the ICTY to engage in detailed, and at times transformative discussions of what, in particular, customary law provided for.<sup>36</sup>

With respect to the International Criminal Tribunal for Rwanda, It was given a closed list of violations of IHL, perhaps as at the time (1994) it was doubted by many if the law of war crimes applied to non-international armed conflicts.<sup>37</sup> The position is now settled though, whilst the substantive law is not identical (tracing the distinction between the two types of conflict), there is criminal liability for certain violations of IHL in Non-International Armed Conflicts.<sup>38</sup>

One of the most modern (and broadly ratified) sets of war crimes can be found in the Rome Statute of the International Criminal Court, and, owing to this, it deserves to be quoted in full, in spite of its length. In spite of its detailed nature though, it ought not to be taken as a comprehensive codification of the law of war crimes. It is not.<sup>39</sup> Nonetheless, it is the definition that has been incorporated into many domestic criminal laws,<sup>40</sup> and is a baseline for the law on point.<sup>41</sup> War crimes are covered by Article 8 of the Rome Statute. This reads, in a slightly redacted form.<sup>42</sup>

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2.
  - a. [grave breaches of the Geneva Conventions, as set out above]
  - b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
    - i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
    - ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

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<sup>35</sup> *Prosecutor v Tadić*, Judgment of the Interlocutory Appeal on Jurisdiction IT-94-1-AR72, 10 October 1995, paras 87-93 See Christopher Greenwood, "International Humanitarian Law and the *Tadić* Case" (1996) 7 *EJIL* 265.

<sup>36</sup> See Darcy, *above* note ??

<sup>37</sup> Peter Rowe, 'Liability for War Crimes in a Non-International Armed Conflict' (1995) 34 *Revue de Droit Militaire et de Droit de la Guerre* 149.

<sup>38</sup> See above note ??

<sup>39</sup> See Generally, William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: OUP, 2<sup>nd</sup> ed, 2016) pp.213-319.

<sup>40</sup> This is often so they may take advantage of the complementarity provisions of the Rome Statute, which provides that the International Criminal Court is not capable of intervening if a State is willing or able to prosecute such offences itself) on which see Articles 17-9 of the Statute and Carsten Stahn and Mohammed el Zeidy (eds), *The International Criminal Court and Complementarity* (Cambridge, CUP, 2012).

<sup>41</sup> Although other States have gone beyond this to update their criminal codes to include all of the war crimes which they feel ought to be criminalised domestically See e.g. David A Blumenthal 'Australian Implementation of the Rome Statute of the International Criminal Court' in David A Blumenthal and Timothy LH McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance* (Leiden: Nijhoff, 2008) 283; William A. Schabas, 'Canadian Legislation for Implementing the Rome Statute' (2000) 3 *Yearbook of International Humanitarian Law* 337.

<sup>42</sup> And needs to be read alongside the Elements of Crimes adopted by the Assembly of States party to the Statute, which, but by virtue of Article 9 of the Rome Statute, are to guide the Court in its interpretation of the crimes (see Erkin Gadriov and Roger Clark, 'Article 9' in Triffterer and Ambos (eds.), *above* note ??), 619.



- iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- iv. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- v. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- vi. Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- vii. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- viii. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- ix. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- x. Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xi. Killing or wounding treacherously individuals belonging to the hostile nation or army;
- xii. Declaring that no quarter will be given;
- xiii. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- xiv. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- xv. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- xvi. Pillaging a town or place, even when taken by assault;
- xvii. Employing poison or poisoned weapons;
- xviii. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- xix. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- xx. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;



- xxi. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- xxii. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- xxiii. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- xxiv. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- xxv. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- xxvi. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

c. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- iii. Taking of hostages;
- iv. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

d. Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

e. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.
- ii. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places

- where the sick and wounded are collected, provided they are not military objectives;
- v. Pillaging a town or place, even when taken by assault;
  - vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
  - vii. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
  - viii. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
  - ix. Killing or wounding treacherously a combatant adversary;
  - x. Declaring that no quarter will be given;
  - xi. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
  - xii. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

f. Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

### *The Rome Definition*

There is no space here to discuss the details of this definition,<sup>43</sup> and it is better to refer to the chapters on the relevant IHL norms herein than recapitulate discussion. However, certain things can be brought out. The first of these is Article 8(1) was a compromise provision, between States that only wanted the ICC to get involved with very high level offences, so suggested that there be a jurisdictional limit on the ICC such that it could not deal with 'small fry' or isolated offences (irrespective of the possible duties on States to do so) and those that were utterly opposed to such a limit. As such Article 8(1) is a careful compromise, that is framed as guidance to the Prosecutor, rather than a jurisdictional limit.<sup>44</sup>

Looking first to international armed conflicts, as mentioned above, in addition to violations of the Grave Breaches provisions of the 1949 Geneva Conventions (but not Additional Protocol

<sup>43</sup> The discussion of war crimes in the Rome Statute (not even more general, takes up just shy of 300 pages in the standard commentary on the Rome Statute, see above note, Triffterer and Ambos (eds.) pp .295-580.

<sup>44</sup> Schabas above note ?? 225-28.

I (Protocol II having no analogous provision anyway)) the ICC has jurisdiction over various other violations of the law applicable to international armed conflicts ‘within the established framework of international law’- which provides for a *renvoi* to the relevant IHL norms, reaffirming the parasitic nature of the law of war crimes on IHL.<sup>45</sup> Hence the interpretation of IHL is at the least what the law of war crimes cannot go beyond. This said, certain provisions of the Rome Statute may be narrower than the relevant IHL norms (Article 8(2)(b)(iv)) may be amongst these.<sup>46</sup> And indeed some clear prohibitions (such as those of biological weapons, are simply missing.<sup>47</sup> This is owing (again), to the fact that the Rome Statute is a negotiated document, and some uncomfortable compromises were reached.<sup>48</sup> Hence it is important to reiterate that the Rome Statute definition is not the alpha and omega of the law of war crimes, as States may have further obligations in relation to conduct, criminalisation, and prosecution that do not find their basis there. This is part of the reason that Article 10 of the Rome Statute provides that ‘Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute’.<sup>49</sup>

The law relating to non-international armed conflict is, in many ways, a pared down version of the provisions relating to international armed conflict. There are some notable omissions, such as any provision on collateral damage, but also, as the Statute was originally drafted, any weapons offences. This was an omission at least partially rectified by the 2010 amendments adopted (although not directly brought into force) in 2010 which made the same weapons offences applicable in international armed conflicts applicable to non-international armed conflicts.<sup>50</sup> For its parties this is now in force. But there is also customary law applicable that is not referable to the Rome Statute. The extent to which it is applicable in a domestic legal order would depend on the constitutional arrangements of the relevant State, but if for such customary war crimes, it would not violate the principle of non-retrospectivity to introduce *ex post facto* legislation to deal with them, as they were already criminal under international law.<sup>51</sup>

## INDIVIDUAL CRIMINAL RESPONSIBILITY

When it comes to war crimes, the substantive law is only part of the story, although domestically we may see the primary perpetrator as the most responsible (depending on our legal traditions), but in international criminal law the position tends (although not always, to be reversed). In international criminal law, the further away from the direct perpetrator

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<sup>45</sup> See above, fn??

<sup>46</sup> Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*(Cambridge: CUP, 2005) pp.272-3.

<sup>47</sup> Some other provisions proved controversial, for political reasons, so for example the provision on the transfer of population into occupied territory was considered by some to be directed at Israel, see Cryer *ibid.*, pp. 273-4.

<sup>48</sup> Cryer, *ibid*, Chapters 5-6.

<sup>49</sup> On which see Otto Triffterer and Alexander Heinze, ‘Article 10’ in Triffterer and Ambos (eds.), above note ??, 644

<sup>50</sup> Amendments to Article 8 of the Rome Statute, Resolution RC/Res.5, 10 June 2010; Amal Amaluddin and Phillippa Webb, ‘Expanding Jurisdiction over War Crimes Under Article 8 of the ICC Statute’ 2010) 8 *JICJ* 1219.

<sup>51</sup> *Vasiliaukas v Lithuania* (Application No. 35343/05) Judgment of 20 October 2015. 20 October 2015 (ECt HR), paras 165-69.

someone gets, the responsibility often increases.<sup>52</sup> The principles of liability are largely (although not comprehensively) set out in the Rome Statute, Article 25 of which states:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - b. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - c. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - d. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - (ii) Be made in the knowledge of the intention of the group to commit the crime;
  - e. In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - f. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Many of these principles of liability will be familiar to domestic criminal lawyers. There are

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<sup>52</sup> See William Schabas, 'Enforcing Individual Criminal Responsibility in International Criminal Law: Prosecuting the Accomplices' (2001) 843 *IRRC* 439.

lengthier treatments of the details of them elsewhere.<sup>53</sup> Perhaps what is notable is that the ICC has used 25(2)(a) to develop a theory of co-perpetration, including what is known as indirect co-perpetration, which drawing of theories of criminal law from Germany, provide for liability of those who are part of a group or system that violates international criminal law.<sup>54</sup> It is questionable whether such a principle is part of customary international law (although for the ICC, as a matter of treaty law, Article 25, as interpreted by the Court, is the controlling law).<sup>55</sup>

The ICTY, on the other hand has asserted that customary international law recognises a concept of perpetration through being a part of joint criminal enterprise, which includes where someone is part of such an enterprise and foresees the possibility of offences occurring. Suffice it to say that it is controversial, both as to the extent to which it is firmly established in customary law, and also whether it is consistent with the principles of criminal law, as intentional offences can be committed by what in the common law world would be considered recklessness.<sup>56</sup> Article 25(3)(d) reflects an analogous concept, but requires that the person knows that the relevant crime will be committed.<sup>57</sup>

Furthermore, when it comes to assistance to a crime, probably narrower than customary international law,<sup>58</sup> the Rome Statute requires that an accomplice engages in their conduct with the purpose of assisting or encouraging a crime. The customary law on point, though, is controversial too, especially with respect to those who are physically distant, the jurisprudence on point, with respect to whether any assistance being required to be 'specifically directed' to helping or encouraging the primary offence is a little mixed.<sup>59</sup> The balance of authorities are against such a requirement.<sup>60</sup>

### *Command Responsibility*

For war crimes, as with other international crimes, international criminal law has a principle of liability that is relatively unknown in domestic law. This is the principle of command responsibility, which is the liability of superiors for crimes committed by their subordinates. The customary law on point is the subject of considerable disagreement, both as to the ambit of the principle, and the nature of the responsibility, the two aspects of which are interlinked.<sup>61</sup> It finds its modern basis in post-war jurisprudence,<sup>62</sup> but its most recent treaty formulation is Article 28 of the Rome Statute.<sup>63</sup> This reads

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<sup>53</sup> See, e.g. Elies van Sledregt, *Individual Criminal Responsibility in International Criminal Law* (Oxford: OUP 2012); Cryer, Friman, Robinson, and Wilmschurst, above note ??, chapter 15.

<sup>54</sup> See the Symposium at (2011) 9 *JICJ* 85-226. Especially Thomas Weigend, 'Perpetration Through an Organization: The Unexpected Career of a German Legal Concept' (2011) 9 *JICJ* 91.

<sup>55</sup> *Prosecutor v Stakić*, Judgment, IT-97-25-A, 22.3.2006 para. 62, and Schabas, above note ?? pp.579-82.

<sup>56</sup> For a useful overview, see Elies van Sledregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, Nijhoff, 2003) pp.94-110. See also the symposium and anthology in (2007) 5 *JICJ* 67-244. On the overlaps see Stefano Manacorda and Chantal Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law' (2011) 9 *JICJ* 159.

<sup>57</sup> See e.g. *Prosecutor v Mbarushimana* Decision on the Confirmation of Charges, ICC-01/04.01/10, 16.12.2011 paras. 288-9.

<sup>58</sup> See *Prosecutor v Tadić*, Judgment, IT-94-1-A, 15.7.1999 para. 229.

<sup>59</sup> Leila Nadya Sadat, 'Can the ICTY Šainović and Perišić Cases Be Reconciled?' (2014) 108 *AJIL* 475.

<sup>60</sup> *Ibid.*

<sup>61</sup> See generally, Guénaél Mettraux, *The Law of Command Responsibility* (Oxford: OUP, 2009); and van Sledregt, *Individual Responsibility*, above note ?? Chapter 8; See specifically Christopher Greenwood, 'Command Responsibility and the *Hadžihasanović* Decision' (2004) 2 *JICJ* 598.

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- a. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - i. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - ii. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- b. With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - i. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - ii. The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - iii. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The requirements for this form of liability have been usefully parsed by the ICTY, who asserted that there are, as a matter of customary law, three requirements, these are that there is a superior/subordinate relationship; second, there is a ‘mental element’ and third, a failure to take reasonable measures to prevent or punish violations of international criminal law.<sup>64</sup> The Rome Statute adds the requirement that the violations must occur as a result of a failure to exercise control over those subordinates. This, in other words, requires an element of causation, which is controversial as a matter of custom, something that has been a matter of considerable debate, both judicially and academically, especially with respect to a failure to punish offences.<sup>65</sup>

In terms of the requirements the condition that there be effective control is not always simple, in particular when non-State actors are at issue, as there may not be a formal structure involved.<sup>66</sup> In practice, this has proved difficult, although not impossible, to prove.<sup>67</sup> When it

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<sup>62</sup> W. Hays Parks, ‘Command Responsibility for War Crimes’ (1973) 62 *Military Law Review* 1, 1–20.

<sup>63</sup> It is also contained in Articles 86 and 87 of Additional Protocol I to the 1949 Geneva Conventions.

<sup>64</sup> *Prosecutor v Delalić et al*, Judgment, IT-96-21, 16.11.1998 para. 344.

<sup>65</sup> See Iyer, Friman, Robinson and Wilmschurst, above note ??, pp.390-92.

<sup>66</sup> See Sandesh Sivakumaran, ‘Command Responsibility in Irregular Groups’ (2012) 10 *JICJ* 1129.

<sup>67</sup> Cryer, Friman, Robinson and Wilmschurst, above note ?? pp.386-88; *Prosecutor v Bemba Gomb*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges Against Jen-Pierre Bemba Gombo ICC-01/05-01/08, 15.6.2009 paras. 414–6.

comes to the mental element, the ICTY has said that what is required is that, as a matter of customary law:

[A superior] . . . may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes . . . or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.<sup>68</sup>

This is not beyond controversy,<sup>69</sup> and is different to the standards set in the Rome Statute. Notably, the Rome Statute adopts different mental elements for military and civilian superiors, a distinction not known to customary law.<sup>70</sup> With respect to superior responsibility, the ICC has determined that, for military superiors, the standard is essentially one of negligence.<sup>71</sup> The standard for civilian superiors has yet to be pronounced upon, but the ICC has expressed its separation from the *ad hoc* Tribunals' jurisprudence on this point.<sup>72</sup> It is likely that with regard to civilian superiors, the standard applicable before the ICC is practically the same as constructive knowledge.<sup>73</sup>

Looking to the activity that needs to be taken to fulfil the duties that are imposed by the international law of command responsibility, the ICTY has said that what is required is what 'can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates . . . What constitutes such measures is not a matter of substantive law but of evidence.'<sup>74</sup>

Hence the level of activity required is linked to the level of control the superior has.

In relation to the duty to prevent and punish (which are separate,) the ICC has said that it

depend[s] on the degree of effective control over the conduct of subordinates at the time a superior is expected to act'; (2) measures must be taken to prevent planning of preparation of crimes, not simply their execution; (3) 'the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react'; and (4) a superior is not 'obliged to do the impossible'.<sup>75</sup>

The duty is thus to do what is possible. It is a duty of conduct rather than result. Not least it ought to be noted that the duty to punish can be fulfilled by submitting the matter to the relevant prosecutorial authorities, as Article 28 makes clear.

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<sup>68</sup> *Ibid.*, paras. 223 and 241.

<sup>69</sup> Mettraux, above note ?? Chapter 10.

<sup>70</sup> van Sliedregt, *Criminal Responsibility*, above note ?? pp.191–2

<sup>71</sup> *Bemba Gombo* above note ??, para 429.

<sup>72</sup> *Ibid.* para. 434

<sup>73</sup> Mettraux, above note ?? pp.194–6.

<sup>74</sup> *Prosecutor v Blaškić*, Judgment, IT-95-14, 29.7.2004 para. 72. See e.g. Ambos, *Treatise on International Criminal Law Volume I: Foundations and General Part* (Oxford: OUP, 2013). pp.217–20.

<sup>75</sup> *Prosecutor v Orić*, Judgment, IT-03-68, 30.6.2006 para. 329.



### *Grounds for excluding criminal responsibility*

Although there are less discussed, perhaps as a result of some discomfort with dealing with the issue,<sup>76</sup> There are defences to war crimes. The clearest of the definition of such general defences, is provided in the Rome Statute. Articles 31-2 provide that

Article 31 ...1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

- (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
- (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
- (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
- (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
  - (i) Made by other persons; or
  - (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32 Mistake of fact or mistake of law 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

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<sup>76</sup> Albin Eser, 'Defences in War Crimes Trials' in Yoram Dinstein and Mala Tabory (eds.), *War Crimes in International Law* (The Hague, 1996) 251. On the issues mentioned here see generally, Cryer Friman, Robinson and Wilmschurst, above n ?? Chapter 16.

Most of these will also be recognisable to domestic criminal lawyers, although the definitions are, as with all aspects of the Rome Statute, the outcome of compromise, that do not reflect any one domestic approach. They include both justifications (such as self defence), excuses (such as duress) and what may be called failure of proof defences (such as mental incapacity).<sup>77</sup> The extent to which some of them reflect customary law is not necessarily clear.<sup>78</sup>

Rather like principles of liability, especially command responsibility, when it comes to defences, international criminal law has some specific provisions.<sup>79</sup> The most important of these is superior orders.<sup>80</sup> Although such a defence was excluded in the Statutes of the Nuremberg and Tokyo International Military Tribunals' Statutes, as well as of those of the ICTY and ICTR, excluded the defence completely.<sup>81</sup> The Rome Statute, however, reinstates the a limited form of the defence, in Article 33, which provides:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
  - a. The person was under a legal obligation to obey orders of the Government or the superior in question;
  - b. The person did not know that the order was unlawful; and
  - c. The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

The customary status of this provision is controversial,<sup>82</sup> and its ambit is not entirely clear.<sup>83</sup> In particular, what is 'manifestly' unlawful, and to whom is a matter of considerable difficulty.<sup>84</sup> It is also the case that that subparagraph 2 is not easy to interpret, as, although the intention was to limit the defence to war crimes, rather than other offences, orders tend to be to engage in conduct, rather than being easily reduced to the categories of international crimes *in abstracto*.<sup>85</sup> The ICC has yet to pronounce on the provision.

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<sup>77</sup> Ambos, above note ?? pp.304-7.

<sup>78</sup> See e.g. *Prosecutor v Erdemović*, Judgment, IT-96-22-A 7.10.1997 Belgium considers the provision on self defence of property to be contrary to *jus cogens*

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>.

<sup>79</sup> Pursuant to Article 31(3), other, customary defences, perhaps including (in limited circumstances, reprisals, insofar as they are not banned under the law of armed conflict, may also be applicable. See ??

<sup>80</sup> The classic study remains Yoram Dinstein, *The Defence of Superior Orders in International Criminal Law* (The Hague: Nijhoff, 1965; Oxford: OUP, 2012).

<sup>81</sup> Charter of the International Military Tribunal, annex to the London Agreement on the Prosecution and Punishment of the major War Criminals of the European Axis Powers 82 UNTS 279, Art. 8. Art. 6 of the Tokyo IMT Charter is largely the same: see Special Proclamation: Establishment of an International Military Tribunal for the Far East, 19 January 1946 TIAS no. 1589., ICTY Statute, Article 7(4) ICTR Statute Article 6(4).

<sup>82</sup> Paula Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law' (1999) 10 *EJIL* 172; *contra* Charles Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?' (1999) 836 *IRRC* 785.

<sup>83</sup> See further Robert Cryer, 'Superior Orders in the International Criminal Court' in Richard Burchill, Nigel White and Justin Morris (eds.), *International Conflict and Security Law* (Cambridge: CUP, 2005) 49.

<sup>84</sup> *Ibid.*, pp.61-3; Schabas, above note?? pp.663-672.

<sup>85</sup> Cryer, above note pp.63-6.

## STATE RESPONSIBILITY FOR WAR CRIMES<sup>86</sup>

Responsibility for war crimes is not limited to individual liability (although, as will be seen, there are obligations in this regard). States have responsibility to prevent and punish war crimes.<sup>87</sup> Looking to the duties to parties to an armed conflict, it is important to note that liability for war crimes between individuals and States is parallel.<sup>88</sup> Neither excludes the other. There is state liability for violations of IHL (which all war crimes are), but of course, there is the necessity of attributability to the State. For the actions of the armed forces, as State actors, they naturally entail State responsibility.<sup>89</sup> For non-State actors the issue is more complex, as their actions are not always referable to a State.<sup>90</sup>

The positive duties of States with respect to preventing and punishing war crimes are surprisingly similar. With respect to international armed conflicts, all States are obliged, pursuant to the grave breaches provisions of the Geneva Conventions, to domestically criminalise such violations, and seek out and either extradite or prosecute those violations.<sup>91</sup> The situation is different for non-international armed conflicts, although human rights obligations are relevant here.<sup>92</sup>

The fundamental obligation that lies upon States, parties to a conflict or not, is contained in Common Article 1 of the 1949 Geneva Conventions, which provides that ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’<sup>93</sup> This requires both prophylactic, and *ex post facto* measures. The former are to be preferred.

The duty in common Article 1 was, in its initial conception, related to the duties in peacetime, such as dissemination rather than anything else, but gradually, as time went on, it became used by States as an entry into issuing diplomatic protests about violations of IHL in conflicts to which they were not parties. However, these were by no means always forthcoming, not least as States were concerned that saying anything could be interpreted as taking sides in the conflict, and therefore often keep silent.

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<sup>86</sup> See generally, Hans-Peter Gasser, ‘Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations’ in Hazel Fox & Michael A. Meyer, *Armed Conflict and the New Law: Vol. II: Effecting Compliance* (London: BIICL, 1993) 15.

<sup>87</sup> See Silja Voleki, ‘Implementation and Enforcement of International Humanitarian Law’ in Dieter Fleck, (ed.), *The Handbook of International Humanitarian Law* (Oxford: OUP, 3rd. ed., 2013) 647.

<sup>88</sup> André Nollkaemper, ‘Concurrence Between Individual Responsibility and State Responsibility in International Law’ (2003) 52 *ICLQ* 615.

<sup>89</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, UNGA/56/10, Chapter II.

<sup>90</sup> The conditions upon which the actions of rebels may be attributable to third States is a matter of some controversy, see e.g. *ibid.* Article 8 and pp.47-49.

<sup>91</sup> Articles 50, 51, 130, 147 of the four conventions, Symposium, ‘The Grave Breaches Regime in the Geneva Conventions: A Reassessment Sixty Years On’ (2007) 7 *JICJ* 653-877; and Paola Gaeta, ‘The Interplay Between the Geneva Conventions and International Criminal Law’, in Andrew Clapham., Paola Gaeta and Marco Sassoli (eds), *The Geneva Conventions: A Commentary* (Oxford: OUP, 2016) 737.

<sup>92</sup> *Velasquez-Rodriguez v Honduras*, IACtHR Series C No 4 (29 July 1988); *McCann v UK* (1995) 21 EHRR 67, para 161.

<sup>93</sup> On which see Robin Geiß, The Obligation to Respect and Ensure Respect for the Geneva Conventions, in Clapham, Gaeta and Sassoli (eds), above note ??, 111; Frits Kalshoven, ‘The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’ (1999) 2 *Yearbook of International Humanitarian Law* 3; Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21 *EJIL* 125.

The ICJ, has taken a very broad approach to common Article 1 in the *Wall* Advisory Opinion, and 'piggy-backed' this to their discussion of the *erga omnes* nature of many, if not most rules of IHL.<sup>94</sup> In this opinion it noted that

It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.... [and]... In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.<sup>95</sup>

Perhaps unsurprisingly, this was not beyond controversy within the Court. Hence, for example, Judge Koojimans questioned the extent to which common Article 1 imposed obligations on parties that were not part of the relevant armed conflict.<sup>96</sup> Judge Higgins, on the other hand, thought that the obligation not to recognise the situation did not rely on the concept of *erga omnes* obligations but that Common Article 1 requires that States should attempt to ensure compliance. She also noted that 'the Court has, in subparagraph (3)(D) of the *dispositif*, carefully indicated that any such action should be in conformity with the Charter and international law.'<sup>97</sup> This is probably the best interpretation of the nature of the obligation as it is currently seen by States.<sup>98</sup> Reprisals that violate the *jus ad bellum*, are certainly not permitted.

In terms of State obligations relating to creating (domestic) individual liability, criminalisation is required by the Geneva Conventions for grave breaches of their provisions. Hence, Article 49 of Geneva Convention I of 1949 provides that

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention...

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article ....<sup>99</sup>

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<sup>94</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories [2004] ICJ Rep. 36, para 157.

<sup>95</sup> *Ibid.*, para 158-59.

<sup>96</sup> *Ibid.*, Separate Opinion of Judge Koojimans, paras 46-50.

<sup>97</sup> *Ibid.*, Separate Opinion of Judge Higgins, para 39.

<sup>98</sup> *Ibid.*

<sup>99</sup> On which see Elizabeth Miles Sturza 'Dissemination of the Geneva Conventions' in Clapham, Gaeta and Sassola (eds.), above note ??, 597.

Added to this, Article 52 of the same convention provides that

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

That said, this latter provision (and, to a large extent the former) has not been implemented in practice, in large part because states are often unwilling to prosecute their own nationals for war crimes.<sup>100</sup>

Criminal law is not the only, or best, measure for suppressing violations of IHL. Hence, the Geneva Conventions, in Common Article 47/48/127/144 create an obligation on States to disseminate IHL, and train people in its use:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains'

Additional Protocol I, Article 83, says, essentially the same thing.<sup>101</sup>

There is sense in this, not least in that it is something of a stretch to say that people ought to be held to standards of which they were entirely, and reasonably, unaware. However, there are limits to this too, not least that fact that during armed conflicts, nationalistic considerations tend to dominate. Further, States have not always been assiduous in implementing this obligation. And where they have, this has not necessarily led to compliance with the law.<sup>102</sup>

One of the most important mechanisms of implementation is the integration of legal advisors into the military decision making system. This is required by Article 82 of additional Protocol I of 1977, which reads

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the

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<sup>100</sup> Timothy L.H. McCormack, 'Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their 'Own Nationals' for International Crimes. In Phillippe Sands and Matthew Lattimer (eds.), *Justice for Crimes Against Humanity* (Oxford: Hart, 2003) 107.

<sup>101</sup> See Michael Bothe, Karl Joseph Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflict* (The Hague: Nijhoff, 1982) pp.501-4.

<sup>102</sup> Yugoslavia was frequently feted for its work in this area prior to its dissolution, in a series of conflicts notable for the violations of IHL, which led to the creation of the ICTY.

Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.<sup>103</sup>

This is extremely important, as although there may be differences of opinion on the interpretation of IHL,<sup>104</sup> well-trained military lawyers can provide important advice on IHL, and can prevent possible violations at the outset.

## CONCLUSION

The law of war crimes is a controversial one, not least as States cannot be certain that their nationals will not commit them. Young soldiers, in stressful situations, and who are highly armed, may well end up violating IHL (as well as their superiors), and thus be responsible for war crimes. This is not inappropriate, but leads to worry in States about their possible liability, both political and legal. This, in addition to nationalistic sentiment that often accompanies armed conflicts, often makes the circumstances surrounding prosecution difficult. Whilst the deterrent effect of prosecutions is not clear<sup>105</sup> there are important retributive reasons for prosecution of war crimes, and, in addition, criminal law is only one means of enforcing IHL.

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<sup>103</sup> See Bothe *et al* above note ??, pp.498-501.;

<sup>104</sup> Schmitt, above note ??

<sup>105</sup> For a modern discussion see Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Intervention on Ending Wars and Building Peace* ((Oxford: OUP 2016).